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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number 887

■

THOMAS HOWARD STULL
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

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INDEX

Subject Index

PAGE

Petition 1
Summary of matters involved 1
1. Preliminary statement 1
2. Opinion of court below 2
3. Statutory provisions sustaining jurisdiction 2
4. Timeliness of the petition 2
5. Release of petitioner does not make cause moot 3
6. Statutes and regulations involved 3
7. Constitutional provisions involved 3
8. Questions presented 3
9. How issues were raised 7
10. Statement of history of the case and the facts 7
History 7
Facts received and rejected 9
Reasons relied on for allowance of writ 14
The cause is not moot 22
Supporting brief 23
Appendix 25

Cases Cited

Anniston Mfg. Co. v. Davis
301 U. S. 337, 351-352 18
Baltimore & O. R. Co. v. United States
298 U. S. 349 21
Bogardus v. Comm'r of Internal Revenue
302 U. S. 34 18
Bridges v. California
314 U. S. 252 19
Burfenning v. Chicago St. P. R. Co.
163 U. S. 322, 323 21
Burrus, In re
136 U. S. 586 21
Catlette v. United States
132 F. 2d 902-907 14

PAGE

Chambers v. Florida
309 U. S. 227, 236-241 ..... 19, 20
Chicago M. & S. P. R. Co. v. Minnesota
134 U. S. 418, 456-457 18
Cobbledick v. United States
309 U. S. 323 21
Consolidated Edison Co. v. N. L. R. B.
305 U. S. 197 18
Crane v. State
5 Okla. Cr. 560 19
Crowell v. Benson
285 U. S. 22, 54, 63 21
Cummings v. Missouri
4 Wall. 277 ..... 16, 17
Davis v. Berry
216 F. 413 17
Dayton Goose Creek R. Co. v. United States
263 U. S. 456, 486 18
Dowdell v. United States
221 U. S. 325, 330 19
Edwards v. United States
312 U. S. 473 19
Falbo v. United States
320 U. S. 549, 64 S. Ct. 346 ..... 1, 14, 15, 20, 22
Fisk, Ex parte
113 U. S. 713, 718 21
Fletcher v. Peck
6 Cranch 137 16
Fullerton v. Texas
196 U. S. 192 15
Garland, Ex parte
4 Wall. 333 16
Godchaux v. Estopinal
251 U. S. 179 15
Gonzales v. Williams
192 U. S. 1 20
Haines v. Buford (Kentucky)
1 Dana 510 17

PAGE

Hovey v. Elliott
167 U. S. 409, 413-418 19
Humphrey v. United States
295 U. S. 602, 624 21
Interstate Com. Comm'n v. L. & N. R. Co.
227 U. S. 88, 91 21-22
Kentucky v. Jones
10 Bush (70 Ky.) 725 17
Kessler v. Strecker
307 U. S. 22, 34-35 21
Lane v. Wilson
307 U. S. 268 20
McVeigh v. United States
11 Wall. 259, 267 19
Missouri P. R. Co. v. Nebraska
217 U. S. 196, 207-208 18
Morgan v. United States
298 U. S. 468, 479-481, 304 U. S. 1, 14-25 21
National Lab. R. Bd. v. Bradford Dyeing Ass'n
310 U. S. 318 21
Ng Fung Ho v. White
259 U. S. 276, 284 21
Ohio Valley Water Co. v. Ben Avon Borough
253 U. S. 287, 289 18
Oklahoma Operating Co. v. Love
252 U. S. 331 18
Ong Chang Wing v. United States
218 U. S. 272, 279 19
Panama Ref'g Co. v. Ryan
293 U. S. 388 19
People v. Kaye
212 N. Y. 407, 416 19
People v. McCoy
125 Ill. 289, 17 N. E. 786 19
Railr'd & W. Comm'n of Minnesota v. Duluth St. R. Co.
273 U. S. 625 20
Richter v. State
16 Wyo. 437 19

PAGE

Rochester Tel. Corp'n v. United States
307 U. S. 125 21
Rogers v. Peck
199 U. S. 425 19
St. Joseph Stock Yards Co. v. United States
298 U. S. 38, 50-52 21
St. L. & S. F. Ry. v. Gill
156 U. S. 649, 666 ..... 18, 21
Schenck v. United States
249 U. S. 47, 52 19
Sibbach v. Wilson & Co.
312 U. S. 1, 16 21
Skinner & Eddy Corp'n v. United States
249 U. S. 557 20
South Chicago Coal & Dock Co. v. Bassett
309 U. S. 251 21
Standard Oil Co. v. United States
221 U. S. 1 20
State v. Kirby
120 Iowa 26 19
State v. Weimer
64 Iowa 243 19
Steines v. Franklin County
14 Wall. 15 15
Tot v. United States
319 U. S. 463, 473 19
United States v. American Tobacco Co.
221 U. S. 189 20
United States v. Idaho
298 U. S. 105, 109-110 21
United States v. Murdock
290 U. S. 389, 395-396 ..... 2, 18
United States v. Stevenson
215 U. S. 190, 199 19
United States ex rel. Vajtauer v. Commissioner
273 U. S. 103 21
Utley v. St. Petersburg
292 U. S. 106 20

Cases Cited

PAGE

Wadley Sou. R. Co. v. Georgia
235 U. S. 651, 660-663 18
West Virginia State B'd of Educ'n v. Barnette
319 U. S. 624, 638-640 19
Willcox v. Consolidated Gas Co.
212 U. S. 19, 53 18
Windsor v. McVeigh
93 U. S. 274 19
Wise v. Withers
3 Cranch 331 21
Wong Wing v. United States
163 U. S. 228 19
Yonkers, City of, v. United States
320 U. S. — (No. 109 Oct. T. 1943) 21
Young, Ex parte
209 U. S. 123, 147 18
Yung Sing Hee, In re
(Cir. Ct. Oregon, 1888) 36 F. 437 17

Statutes Cited

Judicial Code, sec. 240 (a), as amended by
Act of Feb. 13, 1925 2
Regulations, Selective Service System
Secs. 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 627.22, 633.1, 633.2, 633.21, 642.41 3
United States Code
Title 50, Appendix secs. 301-318 ["Selective Training and Service Act of 1940," secs. 3 (a), 5 (d), 10 (a), 11] 3
United States Constitution
Article I, sec. 9, clause 3 ..... 3, 4, 5, 6, 8, 16
Article III, sec. 2, clauses 1-3 ..... 3, 4, 5, 6, 8
Amendment V 3, 4, 5, 6, 8, 15, 18, 19
Amendment VI 3, 4, 5, 6, 8, 19
United States Supreme Court, Rules of
Rule 38, par. 5 (b) 16

MISCELLANEOUS CITATIONS

PAGE

Britannica, Encyclopædia (1942 ed.), Vol. 2, p. 656 17

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THOMAS HOWARD STULL
Petitioner

v.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Thomas Howard Stull, presents this petition for writ of certiorari and shows unto the court as follows:

Summary of Matters Involved

1. Preliminary Statement.

The questions presented in this petition upon the issues raised in the trial court and in the court below have neither been decided nor foreclosed by the opinion and judgment of the court in the case of *Falbo* v. *United States,* 320 U. S. 549, 64 S. Ct. 346, as more fully appears in the statement, reasons relied upon for granting this petition for the writ,

and the accompanying brief filed separately herein supporting this petition. The Act and Regulations thereunder that require a registrant to report for induction as a condition precedent for obtaining judicial review of whether he is exempt from training and service under the Act are directly challenged here as being in direct violation of specific provisions of the Constitution. The issues presented are broader and stronger than those considered in the *Falbo* case. Additional issues are whether or not the petitioner is entitled to have submitted to the jury the question of his honest and good-faith belief that he was exempt from duty and not required to report for induction as bearing upon whether or not he "knowingly, unlawfully and feloniously" evaded his duty under the Act as requested in his requested charges. These requested charges were based on the authority of this court expressed in *United States* v. *Murdock*, 290 U. S. 389, 395-396.*

2. Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals is not yet reported in the *Federal Reporter* but it appears in the record certified and is printed as an appendix to this petition for writ of certiorari at page 25, infra.

3. Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. Timeliness of the Petition.

The judgment of the Circuit Court of Appeals was entered on March 17, 1944. The petition for writ of certiorari is filed within thirty days from the date of the entry of such judgment in said court.

* See Question number 15 of the Questions presented p. 6, infra, this petition.

5. Release of Petitioner Does Not Make Cause Moot.

In the court below the Government filed a motion to dismiss the appeal because it appeared that after the expiration of the ten days' sentence imposed the petitioner was released from custody. Petitioner did not elect to serve the sentence and attempted to obtain bail pending appeal, which was refused by the trial judge. Notice of appeal was served and filed immediately after imposition of the sentence. Since the conviction of petitioner was for a felony, the disabilities of attainder of citizenship rights continue after discharge from custody. The court below held the cause was not moot. (See the appendix, *infra* this petition, page 25. The petitioner presents other reasons why the cause is not moot. See infra pp. 22-23 of this petition.)

6. Statutes and Regulations Involved.

The Selective Training and Service Act of 1940, as amended, Sections 3 (a), 5 (d), 10 (a), 11 (50 U. S. C., Appendix ss. 301-318); and Selective Service Regulations 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 627.22, 633.1, 633.2, 633.21, 642.41, all of which regulations appear in 32 C. F. R. 1941 Supp., 601.7 et seq.

7. Constitutional Provisions Involved.

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

8. Questions Presented.

(1) Are the Act and Regulations, which have been construed so as to require a registrant who is exempt to report for induction as a condition precedent to judicial review and so as to penalize the exempt registrant who fails to respond to an illegal order by denying him the right to challenge the classification, void because constituting a bill

of attainder contrary to clause 3, Section 9 of Article I of the United States Constitution?

(2) Are the Act and Regulations thus construed void because denying to petitioner his right to a judicial trial, to urge his defense of no duty under the Act, to prove his innocence and to a jury trial, contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(3) Can the petitioner, in defense to the indictment, show that the proceedings of the Selective Service System and the order to report for induction were void because the agents of said System had violated the due process clause of the Fifth Amendment to the United States Constitution in arriving at his classification and in ordering him to report for induction when the undisputed evidence showed that he was exempt from all training and service under the Act?

(4) Does the trial court or the jury have the duty and right, upon the trial of an indictment charging an unlawful failure to report for induction, to consider and determine whether the draft boards violated the substantive rights of the petitioner as an exempt registrant contrary to the due process clause of the Fifth Amendment to the United States Constitution?

(5) Can the petitioner, in defense to the indictment, show that the proceedings of the Selective Service System and the order to report for induction were void because the agents of said System had violated the due process clause of the Fifth Amendment to the United States Constitution by denying him a hearing through failure to consider the undisputed evidence before the agency showing that he was exempt from all training and service?

(6) Does the trial court have the duty and right to permit petitioner to show that he was not guilty and that the indictment was void because it was based on an order of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to

law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(7) Does the trial court have the duty and right to permit petitioner to show that he was not guilty and that the indictment was void because it was based on an order of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, over the objection and exception by petitioner that the exclusion of such evidence denied him his right to a judicial trial and a jury trial contrary to clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(8) Did the trial court err in excluding evidence offered by petitioner to show that he was not guilty and that the indictment was void because it was based upon an order of the board made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(9) Did the trial court err in charging the jury that it could not consider the question of whether or not petitioner was exempt as a minister and whether or not the draft board had acted in an arbitrary and unconstitutional manner, and that the only question to be decided was whether or not the petitioner knowingly failed to report for induction over the objection of petitioner that he was denied his rights to a judicial trial and a jury trial contrary to

clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(10) Did the trial court commit error in refusing the requested instructions of the petitioner, all of which required the jury to consider and determine whether the draft board's order was void because the Selective Service System had violated the substantive rights of petitioner as an exempt registrant contrary to the due process clause of the Fifth Amendment to the United States Constitution?

(11) Since the records before the Selective Service System show that the petitioner was a duly recognized minister of religion under the Selective Training and Service Act and the Regulations thereunder, was he exempt from all training and service under the Act?

(12) Did the Selective Service System exceed its authority in classifying the petitioner as liable for training and service and in ordering the petitioner to report for induction in excess of the jurisdiction of said Selective Service System?

(13) Did the Selective Service System act arbitrarily and capriciously in classifying the petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as claimed and the findings of the agency were contrary to the evidence?

(14) Should judicial review of the action of the admintrative agency in ordering the petitioner to report be had by trial de novo in so far as it affects the classification of petitioner?

(15) Did the trial court commit error in refusing the requested instruction of petitioner requiring the jury to consider whether or not his honest good-faith belief that he was exempt as a minister of religion under the Act in determining whether or not the petitioner is guilty?

(16) Did the trial court commit reversible error in holding that Thomas Howard Stull could not show and that the jury could not consider that the Nicholas County Board and its appeal agent had violated the Act and Regulations

and the due process clause of the Fifth Amendment by making prejudicial and malicious statement against Stull, which statements prejudiced the agency and disqualified it to act and caused it to change his classification from 4-D to 1-A to the injury of petitioner?

9. How the Issues Were Raised.

The issues were raised by the motion to quash (Ap. S. p. 2); by rulings of the court excluding evidence (4-231); by the motion for directed verdict at the close of all the evidence (239); exceptions to the court's charge (237-307); and by the requested instructions (239-301).

10. Statement of History of the Case and the Facts.

HISTORY

This criminal action was begun by an indictment[1] returned against Thomas Howard Stull in the District Court of the United States for the Southern District of West Virginia, at Bluefield, charging Stull with an alleged violation of the Selective Training and Service Act of 1940, as amended. It was alleged in the indictment that Stull was a registrant under the Act subject to the jurisdiction of Local Board No. 1 of Nicholas County, West Virginia. That he was classified by the Board of Appeal as liable for training and service under the Act and ordered to report for induction into the Armed Forces. That Stull unlawfully and knowingly failed and neglected to perform a duty imposed upon him under the Act by failing to report for induction.

Before pleading to the indictment[1] said petitioner duly filed and presented his motion to quash the indictment. In this motion it was alleged that the Selective Training and Service Act and the Regulations thereunder were unconstitutional. It was alleged that the Act and Regulations had been construed by the courts so as to require an exempt registrant to report for duty before permitting him to test

[1] The indictment is set forth *en hæc verba*. Ap. S. (Appendix in the *Stull* case) pp. 1-2.

the invalidity of the order for him to report for induction and to penalize him by denying him the right to show, in defense to the indictment, that the order to report was invalid because based on a void and illegal classification. The petitioner alleged that the Act and Regulations, as thus construed, were void because: (1) They constitute a bill of attainder, contrary to Clause 3 in Section 9 of Article One of the Constitution of the United States. (2) They surrender the judicial powers to the draft boards, contrary to Article Three of the Constitution. (3) Deny the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment. (4) Deny the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Constitution and the Sixth Amendment. (5) Permit conviction without evidence of guilt and upon hearsay evidence and deny right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments.[2] This motion to quash was overruled and exception allowed to the petitioner.

Thereafter the petitioner pleaded *"not guilty"* and on January 26, 1944, the trial to a jury began before Hon. Ben Moore, United States District Judge. (4) The evidence was concluded on the same date. (4-239) The cause was not argued by counsel. (294) Thereupon the court charged the jury on the law. (294-296)[3] The petitioner duly objected and excepted to the charge of the court to the jury. (297-301)[4] The petitioner's requested charges were timely presented and refused, to which exceptions were allowed. (240-301)[5]

[2] The trial court permitted appellant to substitute this motion for the original motion which was also overruled. The motion appears in the APPENDIX. Ap. S. pp. 2-3.

[3] The charge of the court is printed in full. See Ap. S. pp. 50-52.

[4] The charge is printed in full. See Ap. S. pp. 50-52.

[5] The requested charges are printed in full. See Ap. S. pp. 49-50; Ap. C. pp. 38-71. The same number and the identical requested charges appear in the record in this case as are printed in the Clayton APPENDIX. Reference is made to the Clayton APPENDIX for all requested charges.

The jury returned a verdict of *"guilty"*. (302)[6] On Thursday, January 27, 1944, for good reasons expressed by the court, the petitioner was sentenced to only *ten days'* imprisonment and placed in the custody of the Attorney General. (303)[7] Thomas Stull duly appealed to the court below.

The petitioner duly filed his assignments of error. Thereafter a full transcript of the record, evidence and all proceedings was settled with the bill of exceptions upon the trial. The transcript and bill of exceptions were timely filed in the court below. The cause was duly submitted to the Circuit Court of Appeals for decision. Upon the foregoing it is submitted that this court has jurisdiction to entertain this petition for writ of certiorari.

FACTS RECEIVED AND REJECTED

Facts Received

Petitioner duly registered under the Act on Feburary 14, 1942 (5), with Local Board No. 1 of Nicholas County at Summersville, West Virginia. On April 28, 1942 he received a questionnaire. (22) The questionnaire was properly filled out and filed with the local board. (6) The questionnaire showed that he was a minister of religion since June, 1935 (27); he also advised the board that he was working at his job as a minister of religion and performing ministerial duties and that he had been acting as a full-time pioneer minister since January, 1942, and that he was connected with the Mt. Lookout, West Virginia, congregation of Jehovah's witnesses. (47) He showed that he was employed by the Watchtower Bible and Tract Society, Inc., 117 Adams Street, Brooklyn, New York. (56-58) He advised that he was a minister of Jehovah's witnesses and acting under the direction of the Watchtower Bible and Tract Society and that he had been formally ordained on June 1, 1935. (27, 51) He also filed with the board

[6] The verdict is printed. Ap. S. p. 55.

[7] The judgment and commitment are printed. See Ap. S. pp. 4-5.

affidavits and other documents proving his status as a minister which were referred to in his questionnaire. (44-46; 52-53; 56-58) He claimed classification as an ordained minister and asked to be placed in Class IV-D. (28, 54)

He also filed a conscientious objector's blank in which he showed that he had religious convictions against participation in war in any form. (48-51) This claim was denied along with his claim for exemption as a minister. (7, 29)

The Nicholas County Local Board No. 1 classified him in class I-A on June 22, 1942, mailed him notice thereof June 25, 1942, which was received by the registrant on or about June 29, 1942. (7, 29, 217)

He duly appealed his case to the Board of Appeal. (8, 29, 54) On appeal he claimed a classification of 4-D, as minister exempt from all training and service. (54, 56) The appeal board referred his case to the Department of Justice for investigation and a report as to his claim as a conscientious objector. (10-12) A hearing was had and an investigation made. A report thereof was made to the Board of Appeal. (12, 117) The Board of Appeal denied all claims on appeal and on November 30, 1942, he was continued in the I-A classification. (8, 29) On December 24, 1942, he was ordered to report for induction on January 4, 1943. (9, 69) He was reported as a delinquent to the District Attorney for prosecution. (9, 72) This delinquency proceeding and prosecution was dropped and his case reopened by the Selective Service System. (12, 71, 78) This was done after Judge Ben Moore of the United States District Court ordered appellant discharged on a writ of habeas corpus because of prejudice on the part of the local board and violation of the Regulations. (110, 215, 218, 219)

Because of said prejudice and violation of the Regulations by this board the Selective Service System transferred appellant's file from Local Board No. 1 of Nicholas County to Local Board No. 2 of Greenbrier County for consideration of his classification and claims for exemption. (13, 220)

Upon first consideration of the matter the Greenbrier board classified appellant in Class 1-A on or about March 26, 1943. (31, 220) He thereupon requested a personal appearance before the local board to discuss his classification, which was granted. He was notified to appear before the Greenbrier board on April 8, 1943. (31) Appellant appeared before the local board and as a result of a reconsideration of his case he was classified as a minister of religion (Class 4-D) and exempt from all training and service on April 8, 1943. (13, 31-32)

Thereafter pursuant to the Regulations appellant's file was returned to the Nicholas County board together with a notification of his 4-D classification. (221) Without notice to petitioner the State Director, due to prejudice generated by the Nicholas County Board, appealed his case to the Board of Appeal, which, without previous notice to petitioner, changed his classification from 4-D to 1-A on July 28, 1943. (103)

On October 4, 1943, petitioner was ordered by the local board of Nicholas County to report for induction on October 15, 1943. He declined to report for induction as directed.

Stull testified that he honestly believed that the notice to report for induction was illegal and unlawful because, the board had violated the Regulations by reclassifying him, had shown prejudice against him, and had illegally denied his claim of exemption as a minister. (229-230) He said he believed that the board should have kept him in 4-D classification where he was put by the Greenbrier board. (232-233) Stull said that at the time he failed to report in October, 1943, he had been advised and honestly believed that under the law as it existed in the federal courts in West Virginia at the time he received the order he could show in defense to the indictment these illegal actions and that therefore he did not unlawfully and knowingly violate the law when he failed to report for induction. (232-233) He further testified that he was a minister of religion and that he honestly believed that the draft boards had not com-

plied with the law in changing him from his ministerial classification to that finally given him. (230-233)

EVIDENCE EXCLUDED

The documents and evidence hereinafter mentioned were respectively excluded and exceptions allowed to the petitioner. The rejected evidence will be divided into two classes: Evidence proving his ministerial status and evidence showing prejudice and a violation of the procedural regulations by the local board of Nicholas County.

Proving Ministry

Affidavits and letters of, George R. Board (Defendant's Exhibit 4, 44), H. G. Elmore (Defendant's Exhibit 5), J. H. Shawver (Defendant's Exhibit 6, 46), Thomas H. Stull (Defendant's Exhibit 8, 52), Thomas H. Stull (Defendant's Exhibit 10, 54), Thomas H. Stull (Defendant's Exhibit 12, 56), J. H. Shawver (Defendant's Exhibit 14, 58), Thomas H. Stull (Defendant's Exhibit 15, 60), Thomas H. Stull (Defendant's Exhibit 18, 63), W. L. Campe (Defendant's Exhibit 19, 67), Thomas H. Stull (Defendant's Exhibit 24, 74), Watchtower Bible and Tract Society (Defendant's Exhibit 29, 87), Thomas H. Stull (Defendant's Exhibit 30, 89); that petitioner had acted as a regular ordained minister of religion devoting his entire time to ministerial duties and conducting Bible studies and preaching sermons before his congregation; and that he performed duties and ceremonies that were similar to those conducted by regular ministers of religion of other denominations and that he stood in the same relation to Jehovah's witnesses and his congregation as did the ministers of other recognized religious organizations, each of which documents was submitted to the local board and placed in petitioner's file.

Also bearing upon his ministerial status and before the draft boards in his file were the special form for conscientious objector (Defendant's Exhibit 7, 48), a certificate

of ordination issued by the *Watchtower Society* which is the same as the one in the *Clayton* case, Clayton petition, pp. 12-13 (Defendant's Exhibit 13, 56), an occupational questionnaire (Defendant's Exhibit 40, 116A), a report of a hearing before the Greenbrier County Board (Defendant's Exhibit 31, 96), and a transcript of the testimony of the petitioner given before the hearing officer of the Department of Justice (Defendant's Exhibit 42, 134-176).

Oral testimony offered by the petitioner pertaining to his activity and status as a minister of religion was excluded. The testimony thus excluded is similar to that heretofore described in the *Clayton* case and reference is here made to such testimony excluded in the *Clayton* case as described on pages 11 to 17, inclusive, of Clayton petition.

Proving Prejudice and Violation of Procedural Regulations

Upon the trial petitioner attempted to show that the local board was prejudiced against him in the extreme and were maliciously conspiring to violate the regulations and appellant's rights under the law, the regulations and the due process clause. Improper and illegal statement and review of the evidence by the Nicholas County board prejudicing the rights and claim of petitioner (Defendant's Exhibits 2 and 3, 30-31); a letter from the Local Board to the Board of Appeal (Defendant's Exhibit 9, 53); the local board on February 10, 1943 (Defendant's Exhibit 26, 79); a statement of one Campbell, a member of the Nicholas County board, mailed to the Board of Appeal (Defendant's Exhibit 36, 108); a statement of one Breckinridge, the appeal agent of the Nicholas County board mailed to the Board of Appeal (Defendant's Exhibit 37, 110); and a report of the hearing and investigation conducted by the Department of Justice Hearing Officer (Defendant's Exhibit 41, 117).

Each of these documents referred to contain highly inflammatory and prejudicial statements based on unsworn

hearsay statements allegedly made to the individuals signing the statements accusing the petitioner of being a draft dodger, a fictitious minister, an insincere person, a person of bad character and evil reputation, that he had relatives who drank liquor and engaged in fist fights and that Jehovah's witnesses were a class of persons of low reputation who had a bad standing in the community. These prejudicial statements are too long to quote here but are printed in full in the APPENDIX. (See Ap. S. pp. 11-39.)

Petitioner also offered to show by his own testimony that he was personally acquainted with two members of the local board; that one of the members of the board had stated to petitioner that he was prejudiced against Jehovah's witnesses and that he would do all that he could to put every one of Jehovah's witnesses into the penitentiary; that another member of the local board, the chairman, had previously demonstrated his extreme prejudice and hatred of petitioner and Jehovah's witnesses by participating, as a conspirator, with one Martin Catlette, in a mob assault against the petitioner and other of Jehovah's witnesses in the Richwood (W. Va.) mob against Jehovah's witnesses. (For a more particular description of this case reference is made to the briefs and appendices and the opinion of the court in the case of *Catlette* v. *United States*, 132 F. 2d 902-907.) All this evidence was excluded from the consideration of the jury. (212-215) This offer of testimony is printed in full in the APPENDIX. (See Ap. S. pp. 11-42.)

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and seriously affect the life, liberty and rights of many thousands of persons who are exempt from all training and service under the Selective Training and Service Act.

These questions are not foreclosed by the decision of this court in the case of *Falbo* v. *United States*, 320 U. S. 549. The question of whether the statute and regulations are bills of attainder and pains and penalties was urged for the

first time to this court on the *Falbo* motion for rehearing. It is assumed that this question was rejected by the court because raised too late under the doctrine of this court announced in *Steines* v. *Franklin County,* 14 Wall. 15; *Fullerton* v. *Texas,* 196 U. S. 192; and *Godchaux* v. *Estopinal,* 251 U. S. 179.

On this petition there are presented questions not considered by this court in the *Falbo* case because not urged. The opinion in the *Falbo* case states that there was no attack upon the parts of the Act and Regulations which require one to comply with the orders of the board. Here there is a direct attack upon both on the grounds that a judicial trial of a judicial question is denied contrary to specific provisions of the Constitution prohibiting such conclusions as expressed in the *Falbo* opinion by this court. The opinion and decision of this court in *Falbo* v. *United States* is declared by Mr. Justice Black to be limited to a very fine point. He said: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process."

Here there are presented questions which go deeper than a challenge to the mere "propriety of a board's classification" but the court is called upon to consider whether or not the Selective Service System violated the rights and liberty of the petitioner contrary to the due process clause of the Fifth Amendment and the specific provisions of the Act and Regulations. The specific provisions of the Constitution compel the permission of judicial review of the administrative action and determination.

The construction placed upon the Act and Regulations so as to require an exempt registrant to comply with all illegal orders of the administrative agency as a condition precedent to obtain judicial review and to deny the petitioner the right to judicial review of the unconstitutional

action of the agency because he refused to comply with the illegal order is a decision on "a federal question in a way probably in conflict with applicable decisions of this court" so as to justify the granting of the writ of certiorari to review the judgment in this case. The *applicable decisions* of this court on the question of whether the construction placed upon the Act and Regulations violates the Constitution are set forth below.

Applicable decisions of this court holding the construction placed upon the statute to be bills of attainder and of pains and penalties are: *Fletcher* v. *Peck,* 6 Cranch 137; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. Compulsion of an exempt person to undergo induction is the same as a test oath condemned in these cases. Denial of the right to an inquiry as to illegality of the order of the board is denial of a judicial trial; and the above cases hold that the denial of a judicial trial by statute is a bill of attainder. If these decisions above cited are not "applicable" within the meaning of Rule 38, Par. 5 (b) of the Rules of this Court, then petitioner asserts that the court below has decided a federal question "which has not been, but should be, settled by this court" and that the circuit court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision" by construing the Act and Regulations so as to convert them into bills of attainder and of pains and penalties contrary to Clause 3, Section 9 of Article I of the United States Constitution.

The Act and Regulations require the petitioner to surrender himself and his civilian rights as a condition to obtain judicial review and if he does not he is conclusively presumed to be guilty of having violated a duty under the Act; and in defense to the indictment cannot show that he had no duty under the Act. This type of law and device for conviction so as to deprive an accused of his defense of no duty under the law and thus show he is not guilty is iden-

tical in terms and principles with the condemned English bills of attainder and of pains and penalties which required the person named therein to surrender himself to the king to be dealt with according to his discretion. If he failed to report at the time and place fixed he was prosecuted as a violator of his duty, which was defined as treason. Upon the trial his guilt or violation of a duty was conclusively presumed by virtue of his failure to report at the time and place named in the bill. At the trial the accused was allowed trial by jury and the right to have counsel; but the questions to be determined at the trial were whether the accused was the person named in the bill and whether he reported at the time and place fixed. As in the case at bar the accused was denied the right to show that he had violated no duty. A research of history and the law proves that the similarity brings the construction placed upon the law within the condemnation of the bill of attainder provisions of the Constitution. Wooddeson, *A Systematical View of the Laws of England* (1777), pp. 621-648; *The Catholic Encyclopedia,* Vol. II, p. 59; *Encyclopædia Britannica* (1942 ed.) Vol. 2, p. 656; Cooley, *Constitutional Limitations,* 8th ed., Vol. 1, pp. 536-539; Story's *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216; *Cummings* v. *Missouri,* 4 Wall. 277; *Haines* v. *Buford* (Kentucky), 1 Dana 510; *Kentucky* v. *Jones,* 10 Bush (70 Ky.) 725; *In re Yung Sing Hee* (Circuit Court, Oregon), 36 F. 437 (1888); *Davis* v. *Berry,* 216 F. 413; and Watson's *The Constitution of the United States* (Callaghan & Co., 1910), Vol. 1, pp. 736-737.

The action of the district court in refusing to charge the jury that they could consider, in determining whether the petitioner was guilty of wilfully, knowingly and feloniously failing to perform a duty imposed upon him under the Act and Regulations, that the petitioner honestly and in good faith believed that he was exempt under the Act and Regulations for duty of training and service because a minister of religion, constituted a decision on an important question

of federal procedure in conflict with the applicable decision of this court in *United States* v. *Murdock,* 290 U. S. 389, 395-396.[8]

The failure of Congress to provide for judicial review of an illegal order of an administrative agency upon which the indictment is based is a direct violation of the due process clause of the Fifth Amendment. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 456-457; *St. Louis & San Francisco Ry.* v. *Gill,* 156 U. S. 649, 666; *Ex parte Young,* 209 U. S. 123, 147; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 486; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351-352; *Bogardus* v. *Commissioner of Internal Revenue,* 302 U. S. 34; and *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197.

To require one to report for induction who is exempt from duty under the Act and to surrender his civilian rights and undergo the certainty of extreme punishment for failure to comply with regulations of the armed forces as a condition to obtain judicial review by writ of habeas corpus is to impose such severe penalties as to deny judicial review of an illegal order altogether and constitutes a violation of the due process clause of the Fifth Amendment. *Ex parte Young,* 209 U. S. 123, 147; *Missouri Pac. R. Co.* v. *Nebraska,* 217 U. S. 196, 207-208; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 53; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

The Act and Regulations thereunder have been construed so as to permit the trial courts in prosecutions under the Act to strike all defenses raised under the plea of not guilty, deny the right of the defendant to be heard as

[8] Although this point was not briefed below it was raised by the bill of exceptions, appendix, and called to the attention of the court below upon the oral argument and to the district court by requested instructions Nos. 37, 37A, 37B and 38, Ap. C. pp. 43-45. These requested charges were also made in behalf of petitioner, Stull. They appear in the record although not printed in this APPENDIX. For convenience the above reference is made to the Clayton APPENDIX. See Stull APPENDIX pp. 49-50.

to his innocence, permit conviction upon an ex parte order of the administrative agency, dispense with the requirement that the accused be confronted with witnesses against him as to his violation of a duty, and deny the right of cross examination because of the contempt of the administrative agency shown by the petitioner in failing to comply with the illegal order of the administrative agency, which construction violates the rights of the accused in criminal cases guaranteed by the Fifth and Sixth Amendments to the United States Constitution. *McVeigh* v. *United States,* 11 Wall. 259, 267; *Windsor* v. *McVeigh,* 93 U. S. 274; *Dowdell* v. *United States,* 221 U. S. 325, 330; *Edwards* v. *United States,* 312 U. S. 473; *United States* v. *Stevenson,* 215 U. S. 190, 199; *Rogers* v. *Peck,* 199 U. S. 425; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Wong Wing* v. *United States,* 163 U. S. 228; *Hovey* v. *Elliott,* 167 U. S. 409, 413-418; *Panama Ref'g Co.* v. *Ryan,* 293 U. S. 388; and *Tot* v. *United States,* 319 U. S. 463, 473. Compare *Chambers* v. *Florida,* 309 U. S. 227, 236-241; *People* v. *McCoy,* 125 Ill. 289, 17 N. E. 786; *People* v. *Kaye,* 212 N. Y. 407, 416; *State* v. *Weimer,* 64 Iowa 243; *State* v. *Kirby,* 120 Iowa 26; *Crane* v. *State,* 5 Okla. Cr. 560; and *Richter* v. *State,* 16 Wyo. 437.

There is no showing made, nor could it be reasonably claimed, that the permitting of the making of the defense of exemption from duty constitutes a real, substantial, and immediate danger that the raising of an army and navy or the safe prosecution of the war will certainly result from allowing the petitioner to make his defense to the indictment. Since the rights expressly guaranteed by the specific provisions of the Constitution cannot be denied or abridged in the absence of a showing of a clear and present danger of real and substantial injury to some interest of the state (*Schenck* v. *United States,* 249 U. S. 47, 52; *Bridges* v. *California,* 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640), the right to a judicial review of the illegal order in defense to the indictment cannot be denied. The total number of exempt per-

sons under the Act, including those claiming ministerial classification, constitute such a small proportion of the registrants as to dispel any claim of clear and present danger. Read, in this connection, the clear and forceful reasoning of Mr. Justice Murphy in his dissenting opinion in the case of *Falbo* v. *United States*, 320 U. S. 549.

The holding of the court below is in conflict with applicable decisions of this court holding that the defense of reasonable restraint of trade must be permitted in answer to an indictment prosecuted under the Anti-Trust Law. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 189.

The argument that there is no constitutional exemption from military duty does not add weight to the factitious conclusion that the petitioner is not entitled to a judicial review in response to the indictment. The right to judicial review of administrative action has never been conditioned upon such a finding. Practical considerations are not adequate to support the denial of due process in criminal cases. *Chambers* v. *Florida*, 309 U. S. 227, 236-238, 240-241.

The holding of the court below that there must be a compliance with the administrative order is in conflict with applicable decisions of this court holding that such orders need not be complied with because they did not contemplate an administrative hearing. *Utley* v. *St. Petersburg*, 292 U. S. 106; *Lane* v. *Wilson*, 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.*, 273 U. S. 625; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; and *Gonzales* v. *Williams*, 192 U. S. 1. In the latter case it was held that if, as in the case at bar, the contention is that the administrative agency had no jurisdiction or exceeded its authority in taking action it was not necessary to comply with the order or exhaust administrative remedies as a condition precedent to judicial review.

The holding of the court below that the order cannot be attacked because not complied with is in conflict with applicable decisions of this court holding that if the executive

agency invokes the judicial process to enforce its fiats the proceedings become sufficiently severed from the administrative process to command judicial review in spite of the fact that the administrative process has not been completed. *Cobbledick* v. *United States,* 309 U. S. 323; *In re Burrus,* 136 U. S. 586; *Ex parte Fisk,* 113 U. S. 713, 718; and *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

The holding of the court below that petitioner cannot attack an illegal order because of failing to comply with it is in conflict with applicable decisions holding that there is need for judicial review under circumstances identical to those involved here. Want of jurisdiction can be determined without compliance with orders. *Wise* v. *Withers,* 3 Cranch 331; *Crowell* v. *Benson,* 285 U. S. 22, 54, 63; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *Kessler* v. *Strecker,* 307 U. S. 22, 34-35; *Burfenning* v. *Chicago St. P. R. Co.,* 163 U. S. 322, 323; *United States* v. *Idaho,* 298 U. S. 105, 109-110; *City of Yonkers* v. *United States,* 320 U. S. —, No. 109 October Term 1943. If it is asserted that the administrative agency has violated due process of law in its proceedings or determination there must be judicial review. *Crowell* v. *Benson,* 285 U. S. 22, 56-57; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 50-52; *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349. If the order is claimed to be unsupported by substantial evidence and the result of arbitrary and capricious action of the agency there must be judicial review. *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103. The charge of bias and prejudice on the part of the administrative agency and the denial of a hearing by refusal to give consideration commands judicial review. *Humphrey* v. *United States,* 295 U. S. 602, 624; *Morgan* v. *United States,* 298 U. S. 468, 479-481; 304 U. S. 1, 14-25; and *Interstate Commerce Comm'n*

v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91.

Petitioner here challenges the correctness of the decision of this court in the case of *Falbo* v. *United States*, 320 U. S. 549, and insofar as it may be argued to control any of the questions here presented the court is requested to reconsider the doctrine announced in that decision because it is completely out of harmony with and in conflict with the Constitution and prior decisions of this court.

Petitioner asserts that upon many of the questions presented the courts below have decided an important question of federal law which is not in accord with applicable decisions of this court. On other questions the courts below have decided important questions of federal law and constitutional law which have not been, but should be, settled by this court. It is also claimed that upon all these questions presented the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. It is submitted that this case is one call for the exercise of this court's supervisory powers under the statute and rules of this court.

The Cause Is Not Moot

It is submitted that the Circuit Court of Appeals was correct in overruling the Government's motion to dismiss the appeal and in holding that the release of petitioner pending the appeal did not make moot the questions presented. This issue is fully discussed in the supporting brief filed separately and in the opinion of the Circuit Court of Appeals which is printed as an appendix to this petition to which petitioner here refers for further argument against the suggestion of the Government that this petition should be dismissed because moot. Before any such technical rule denying a person the right to review a conviction for a felony which attaints him throughout his life and continuously denies him certain of his valuable rights of

citizenship this court should fully review the principles involved, allow full argument, and fully discuss the reasons supporting the doctrine advanced by the Government.

SUPPORTING BRIEF

Upon the question of mootness urged upon the court by the motion of the Government in the court below and also upon each of the questions presented upon this petition for writ of certiorari an argument is made by petitioner in his supporting brief. The supporting brief usually printed as a part of the petition for writ of certiorari has been prepared, printed and filed separately. The court is referred to said separate brief filed herein and requested to consider the same as a part of this petition and with this petition before deciding whether the writ should be granted. It is submitted that grave and substantial questions are presented which need a determination by this court after full argument by counsel in open court; and to this end the petition for writ of certiorari as hereinafter prayed for should be granted.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

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